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SolarCity Corp.

16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 SAN FRANCISCO DIVISION

19 JOSE ALBINO LUCERO JR., on Behalf of
20 Himself and all Others Similarly Situated,

21 Plaintiffs,

22 v.

23 SOLARCITY CORP.,

24 Defendant.
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Case No. 3:15-cv-05107-RS

**DEFENDANT SOLARCITY CORP.'S
NOTICE OF MOTION AND MOTION
TO EXCLUDE THE EXPERT REPORT
AND TESTIMONY OF RANDALL A.
SNYDER**

Hearing Date: March 9, 2017
Time: 1:30 p.m.
Judge: Hon. Richard G. Seeborg
Courtroom: 3, 17th Floor

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The motion is based on this Notice of Motion and Motion; the Memorandum of Points and Authorities below; the materials attached to the Declaration of Paul D. Meyer (cited hereinafter as “Ex. A-H”) that are being filed herewith; the record in this matter; and such other and further papers, evidence, and argument as may be submitted in connection with this motion.

Orrick, Herrington & Sutcliffe LLP

Counsel for SOLARCITY CORP.

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Plaintiff's reliance on the expert report of Randall Snyder to support his motion for class
4 certification is ill-founded and misguided. Plaintiff contends that Snyder's report helps establish
5 that common questions unite the proposed autodialer class, and that those questions predominate
6 over individualized inquiries, [REDACTED]

7 [REDACTED]
8 [REDACTED] But Snyder's report establishes no such thing. It is fundamentally unreliable.

9 Snyder's opinion is unreliable because he bases his opinion *not* on the products that Solar-
10 City's sales team actually used, but on different industry products offered by the same phone com-
11 panies. Remarkably, Snyder claims he did so because what he was "essentially . . . asked to do"
12 was determine if the telephone system providers generally offered "a product that has the capabil-
13 ities of what an automatic telephone dialing system is." Declaration of Christina Guerola Sarchio
14 in Support of Defendant SolarCity Corp.'s Opposition to Motion for Class Certification, Ex. H
15 Deposition of Randall A. Snyder ("Snyder Dep.") 212:14-212:20. [REDACTED]

16 [REDACTED]
17 [REDACTED].
18 The shortcomings in Snyder's analysis are even more apparent in light of what else he failed
19 to do. [REDACTED]

20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED] Even with those
25 failings, Snyder's report and testimony might nonetheless be admissible if he had extensive previ-
26 ous experience working with the systems he opines about and could therefore reliably draw from
27 his background knowledge. But Snyder possesses no previous experience working directly with
28 these particular systems. He has never physically inspected the systems, or similar systems. And

1 he has not spoken or asked to speak with anybody who has such experience.

2 Given these deficiencies, it is unsurprising that Snyder’s report is barren of facts that would
3 help the Court decide whether each of SolarCity’s phone systems was, in fact, an ATDS, or whether
4 common questions underlie that determination. Snyder did little more than copy-paste-and-edit the
5 first 13 pages of his report from previous reports he has written about different telephone systems;

6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED].

14 Snyder’s report is unreliable for the additional reason that it is grounded in unsupported
15 legal conclusions. Instead of factually describing the specific capabilities of the phone systems,
16 Snyder attempts to answer the ultimate legal question of whether each system constitutes an ATDS.

17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]. But in so concluding, Snyder adopts a definition of “human

21 intervention” and “capacity” that stretches the imagination and is untethered from legal or profes-
22 sional authority.

23 Finally, Snyder’s personal biases further undermine his report’s reliability. In 2014,
24 Snyder’s wife served as a lead plaintiff in a TCPA lawsuit that her husband helped to initiate with
25 the help of a law firm that he had worked for as a plaintiffs’ expert. Indeed, at the time of his wife’s
26 suit, Snyder was working as a plaintiffs’ expert in separate TCPA litigation, again offering his
27 broad interpretation of what constitutes an ATDS. Snyder has also admitted that he has a personal
28 interest in TCPA cases because he wants to end what he calls “annoying and harassing robocalls.”

1 And Snyder has worked hard to reach that goal. One hundred percent of his work-related income
2 comes from serving as a litigation expert, to a tune of more than \$300,000 last year alone. He was
3 hired by plaintiffs in 78 of the 79 TCPA cases he has worked on. Such evidence of bias goes
4 beyond merely undermining Snyder's credibility and goes directly to the reliability of his opinions
5 and underlying analytical approach.

6 These multiple deficiencies are glaring and fatal to the admissibility of Snyder's report and
7 testimony. This Court should exclude the report and testimony as unreliable under Federal Rule of
8 Evidence 702 and *Daubert*, insofar as Snyder's opinions relate to the capabilities of the phone
9 systems that SolarCity used.¹

10 **II. BACKGROUND FACTS**

11 **A. SolarCity's Distinct Phone Systems**

12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
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[REDACTED]

B. Plaintiff’s Proposed Autodialer Class

Plaintiff asserts claims on behalf of a putative autodialer class that consists of two subclasses of individuals who allegedly received calls “made through the use of an automated telephone dialing system” during the putative class period. Dkt. 93.04 at 4-5.

Plaintiff argues that class-wide common questions of law and fact exist among class members to satisfy Federal Rule of Civil Procedure 23(a), and that such questions predominate pursuant to Rule 23(b)(3). Specifically, Plaintiff contends that the putative class satisfies Rule 23(a)’s commonality requirement because all claims are rooted in the fact that SolarCity “plac[ed] calls utilizing automated telephone dialing systems without the recipients’ prior express consent[.]” Dkt. 93.04 at 9. And under Rule 23(b)(3), Plaintiff argues that such common questions predominate because SolarCity “placed calls using an automated telephone dialing system,” Dkt. 93.04 at 13, and liabil-

1 ity therefore turns on a “uniform policy that [was] uniformly implemented,” Dkt. 93.04 at 13 (quot-
2 ing *Kamar v. Radio Shack Corp.*, 254 F.R.D. 387, 399 (C.D. Cal. 2008)).

3 **C. Snyder’s Report**

4 Plaintiff relies on Snyder to establish that each class member received a call from an ATDS.²

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED].

9 To do so, Snyder’s report begins with 13 pages of background largely copied-pasted-and-
10 edited from his previous expert reports in other litigation. Ex. A (Snyder Rpt.) ¶¶ 1-35; Snyder
11 Dep. 61:3-62:19. Those pages describe Snyder’s understanding of the TCPA—mostly based on
12 his understanding of FCC legal guidance—and his general knowledge of how modern telephones
13 work. Ex. A (Snyder Rpt.) ¶¶ 1-35; Snyder Dep. 61:3-62:19. [REDACTED]

14 [REDACTED]. Ex. A (Snyder Rpt.) ¶¶
15 36-43.

16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]

27 ² The TCPA defines an ATDS as “equipment which has the capacity—(A) to store or produce tel-
28 ephone numbers to be called, using a random or sequential number generator; and (B) to dial such
numbers.” 47 U.S.C. § 227(a)(1).

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Ex. A (Snyder Rpt.) ¶¶ 73-75.

In reaching his conclusion, Snyder testified he reviewed information from three sources.
See Ex. A (Snyder Rpt.) ¶¶ 3, 38, 39, 41, 43.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

2. SolarCity Witness Testimony

Second, Snyder relied on the depositions of four SolarCity company officials. Ex. A

[REDACTED]

(Snyder Rpt.) ¶ 3.

. Raymond Dep. 191:7-11.

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Notably, the version of the script that Snyder submitted with his report omitted that date. Snyder Dep. 140:11-17. Snyder apologized in his deposition for the “oversight.” Snyder Dep. 140:16-17.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

D. Snyder's Deposition Testimony

1. Snyder's Lack of Experience

In his deposition, Snyder confirmed that he has no personal or professional experience with any of the phone systems at issue in this case, apart from some possible limited exposure to them in his previous litigation work. Snyder Dep. 51:4-19, 155:4-156:2, 215:25-217:8, 236:16-238:4. Specifically, Snyder testified that he has never attended or taught any courses regarding the systems, has never written about them professionally, has never worked directly with them, and has never interviewed anybody who has such experience. Snyder Dep. 51:4-19, 155:4-156:2, 215:25-217:8, 236:16-238:4.

2. Snyder's Concession That an Individualized Phone System Analysis Is Necessary

Regarding how to analyze whether a phone system has the capabilities to make it an ATDS, Snyder agreed that an analysis must be focused on the individualized technological issues inherent in each system. See Snyder Dep. 239:5-24. For instance, to determine whether a system can dial numbers without human intervention, Snyder testified that he

would have to know the exact protocols, precisely what occurred, how numbers were stored, how they were presented, the actual topology and architecture of the system, how the number was passed into the centralized dialing system, how the centralized dialing system signaled out the digits. There is quite a bit of information that's required in order for me to say this machine has its capacity and it also was used in a certain way.

1 Snyder Dep. 67:17-68:1. Snyder elaborated that a typical PBX system that requires an agent to
2 manually dial or click-to-dial a number may or may not be an ATDS, depending on other criteria.

3 Snyder Dep. 72:16-73:16.

4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]

15 **3. Snyder's Definition of "Human Intervention"**

16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
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[REDACTED]

4. Snyder’s Personal Interest in TCPA Cases

Snyder’s deposition testimony also described his personal interest in serving as a plaintiff’s expert witness in TCPA litigation. Snyder testified he has been retained by plaintiffs in 78 of the 79 TCPA cases he has been involved in as an expert. Snyder Dep. 19:15-21. Yet in letters to the FCC advocating for a strict reading of the TCPA, he has stated that he has been retained by both plaintiffs and defendants, without any qualification of that statement. Ex. D (Snyder FCC letter) 1. Further, Snyder testified in his deposition that 100 percent of his work-related income since 2014 has come from serving as a litigation expert. Snyder Dep. 49:7-50:2. In 2016, that income totaled approximately \$300,000. Snyder Dep. 48:20-22.

Snyder also confirmed that his wife was a lead plaintiff in a TCPA lawsuit that he helped initiate in 2014 with the help of a law firm that he had worked for extensively as an expert. Snyder Dep. 40:17-44:4; *see also* Ex. E (Complaint, *Snyder v. IvisionMobile, Inc.*, No. 13-cv-05946 (N.D. Cal. filed Apr. 15, 2014)). The lawsuit concerned a few unsolicited commercial text messages that the Snyders’ minor son received after activating a new phone. Snyder Dep. 40:23-41:17. At the time of the suit, Snyder was working as a plaintiffs’ expert in separate TCPA litigation also concerning text messaging, offering his broad interpretation of what constitutes an ATDS. *Compare* Ex. F (Docket, *Snyder v. IvisionMobile, Inc.*) with Ex. G (Snyder Dep. in *Dominguez v. Yahoo!*

1 *Inc.*, 8 F. Supp. 3d 637 (E.D. Pa. 2014)). The suit brought by Snyder’s wife settled in November
2 2014, and Snyder believes that his wife received monetary compensation through the settlement.
3 Snyder Dep. 45:15-18. Further confirming his personal interest in TCPA litigation, Snyder testified
4 that he enjoys being a plaintiffs’ expert because he wants to end what he calls “annoying and har-
5 assing robocalls.” Snyder Dep. 40:4-5.

6 **III. LEGAL STANDARD**

7 Federal Rule of Evidence 702 permits expert testimony where “(a) the expert’s scientific,
8 technical, or other specialized knowledge will help the trier of fact to understand the evidence or to
9 determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is
10 the product of reliable principles and methods; and (d) the expert has reliably applied the principles
11 and methods to the facts of the case.” Fed. R. Evid. 702.

12 In applying Rule 702, a district court “must act as a ‘gatekeeper’” by “making a preliminary
13 determination that the expert’s testimony is reliable.” *Ellis v. Costco Wholesale Corp.*, 657 F.3d
14 970, 982 (9th Cir. 2011) (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 145, 147-49
15 (1999)). As the Supreme Court established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, a
16 district court must focus on the reliability of an expert’s “principles and methodology, not on the
17 conclusions that they generate.” 509 U.S. 579, 595 (1993); *see also Daubert v. Merrell Dow*
18 *Pharm., Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995) (“[T]he test under *Daubert* is not the correctness
19 of the expert’s conclusions but the soundness of his methodology.”). Although *Daubert* itself
20 concerned scientific testimony, the requirements of reliability that it described apply to all expert
21 testimony. *Kumho Tire*, 526 U.S. at 141; *see also In re Ford Tailgate Litig.*, No. 11-CV-02953,
22 2015 WL 7571772, at *5 (N.D. Cal. Nov. 25, 2015), appeal dismissed (Feb. 16, 2016) (Seeborg,
23 J.).

24 The requirement that expert opinions be reliable, articulated by cases like *Daubert* and
25 *Kumho Tires*, applies with equal force in the class certification context, when the expert’s opinion
26 is important to the certification determination. *See Ellis*, 657 F.3d at 982 (observing that “the dis-
27 trict court correctly applied” *Daubert*’s evidentiary standard when considering motions to strike
28 expert testimony in class certification proceedings); *In re Montage Tech. Grp. Ltd. Sec. Litig.*, No.

1 14-CV-00722, 2016 WL 1598666, at *8–9 (N.D. Cal. Apr. 21, 2016) (applying *Daubert* to expert
2 testimony at the class certification stage). “Given that class actions consume vast judicial resources
3 and that many defendants face substantial settlement pressures as a result of class certification . . .
4 it hardly seems appropriate to allow flimsy expert opinions to buttress plaintiffs’ FRCP 23 argu-
5 ments.” *Pecover v. Elec. Arts Inc.*, No. C 08-2820, 2010 WL 8742757, at *3 (N.D. Cal. Dec. 21,
6 2010).

7 The plaintiff bears the burden to establish the admissibility of expert testimony by a pre-
8 ponderance of the evidence. *See* Fed. R. Evid. 702, Advisory Committee Notes; *In re Montage*
9 *Tech.*, 2016 WL 1598666, at *8. In determining whether a plaintiff has met that burden, “[a] trial
10 court has broad latitude not only in determining whether an expert’s testimony is reliable, but also
11 in deciding how to determine the testimony’s reliability.” *Ellis*, 657 F.3d at 982 (citing *Kumho*
12 *Tire*, 526 U.S. at 152). In some cases, for instance, the scientific basis for an expert’s conclusions
13 may be most relevant to the question of reliability. *See Kumho Tire*, 526 U.S. at 150. “In other
14 cases, the relevant reliability concerns may focus upon personal knowledge or experience.” *Id.*

15 At bottom, a district court must “make certain that an expert, whether basing testimony
16 upon professional studies or personal experience, employs in the courtroom the same level of in-
17 tellectual rigor that characterizes the practice of an expert in the relevant field.” *Id.* at 152.

18 **IV. ARGUMENT**

19 **A. The Court Should Exclude Snyder’s Declaration and Testimony Because** 20 **They Are Fundamentally Unreliable.**

21 **1. Snyder Failed to Analyze the Phone Systems That SolarCity Used, or** 22 **Even Systems That Were Contemporaneous to Those SolarCity Used.**

23 For an expert to provide opinions about the operation of a phone system, one would expect
24 the expert’s analysis to meet some minimum, common sense, threshold requirements. First, the
25 expert should physically examine the phone system, or have extensive experience working directly
26 with it. Second, he should describe the features of the specific product used, such as how it makes
27 phone calls and stores phone numbers. Third, in the event that circumstances prevent the expert
28 from physically inspecting the phone system, he should conduct a thorough review of the technical
literature regarding the product or model at issue, and, if he has questions, he should speak with

1 individuals who have experience working with that product. Fourth, in the event that a specific
2 product or model cannot be ascertained, the expert should analyze the products on the market at the
3 relevant time of use, and provide some comparative assessment of capabilities.

4 Those analytical basics make particular sense in light of the FCC’s 2015 TCPA Omnibus
5 Order, which emphasizes that the particulars of the equipment used are critical to assessing whether
6 that equipment qualifies as an ATDS. *See* In the Matter of Rules & Regulations Implementing the
7 Telephone Consumer Protection Act of 1991, 30 F.C.C. Rcd. 7961 (July 10, 2015) (“2015 FCC
8 Order”). For instance, the 2015 FCC Order describes how not every piece of modern dialing equip-
9 ment has the capacity to be an autodialer, and “there must be more than a theoretical potential that
10 the equipment could be modified to satisfy the ‘autodialer’ definition.” 2015 FCC Order ¶ 18.
11 Similarly, the 2015 FCC Order stressed that determining whether a phone system can dial numbers
12 without human intervention is a highly fact-specific inquiry: “How the human intervention element
13 applies to a particular piece of equipment is specific to each individual piece of equipment, based
14 on how the equipment functions and depends on human intervention, and is therefore a case-by-
15 case determination.” *Id.* ¶ 17. Indeed, as Snyder himself testified, determining whether a phone
16 system can dial without human intervention requires an understanding of the “actual topology and
17 architecture of the system, how the number was passed into the centralized dialing system, [and]
18 how the centralized dialing system signaled out the digits,” among other factors. Snyder Dep.
19 67:17-68:1; *see also* Horak Decl. ¶ 66 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 Yet Snyder performed none of the elementary analytical steps described above, even though
24 his report indicates that he did. [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

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[REDACTED]

⁴ It is also notable that Plaintiff’s counsel chose not to depose a technical representative from SolarCity. Nor has Plaintiff’s counsel indicated that SolarCity’s discovery responses were insufficient or incomplete.

[REDACTED]

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[REDACTED]

Those statements alone should disqualify Snyder’s report as based on unreliable methods, particularly insofar as Plaintiff seeks to use Snyder’s opinions to establish at the certification stage that individuals in the autodialer class each received calls “made through the use of an automated telephone dialing system.” Dkt. 93.04 at 4-5; *see Ellis*, 657 F.3d at 982. By way of analogy, imagine an automotive products liability case where a key question at the certification stage is whether a particular Ford car had the capacity to regulate its speed without human intervention. The relevant inquiry would not be whether Ford makes certain models of cars with cruise control, but whether the particular model in question had cruise control installed. The same logic applies here. *See generally Obrey v. Johnson*, 400 F.3d 691, 696 (9th Cir. 2005) (observing that evidence may be excluded as unreliable if it “suffer[s] from serious methodological flaws”); *Kamakahi v. Am. Soc’y for Reprod. Med.*, 305 F.R.D. 164, 176 (N.D. Cal. 2015) (citing *Obrey* in the class certification context).

[REDACTED]

[REDACTED]

At bottom, a court should exclude evidence when it finds “that there is simply too great an analytical gap between the data and the opinion proffered.” *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). Such is plainly the case here, given the gaping empirical gulf between Snyder’s conclusions and the information that he bases those conclusions on. This court recently considered and excluded similarly deficient expert testimony in *In re Ford Tailgate Litigation*, No. 11-CV-02953, 2015 WL 7571772, at *5-9 (N.D. Cal. Nov. 25, 2015), appeal dismissed (Feb. 16, 2016) (Seeborg, J.). The court rejected the experts’ opinions, in part, because of the unreliability of the experts’ methods, the lack of sufficiently underlying data, and the failure of one expert to “back up his opinions with reference to any meaningful testing, literature, or comparisons.” *Id.* at *7-9. Similarly, here, Snyder’s opinions are fundamentally unreliable for many of the same general reasons: a lack of sufficient data, questionable methodology, and the failure to adequately ground his opinions in “testing, literature, or comparisons.”

a. Other courts have rejected Snyder’s expert opinions on similar grounds.

Notably, Snyder has done this before, although not to this extent. In 2014, the Southern District of Florida excluded his expert testimony about whether a company used a phone system that constituted an ATDS when it sent text messages. *Legg v. Voice Media Grp., Inc.*, No. 13-62044-CIV, 2014 WL 1767097 (S.D. Fla. May 2, 2014). The court found that Snyder had failed to inspect any of the relevant equipment and instead relied on a handbook produced by the vendor that the company used to send its text messages. *Id.* at *5. The court concluded that “Snyder does

1 not know whether [the defendant company] actually used the systems discussed in the handbook,
2 or in the manner provided in the handbook. Indeed, Snyder cannot even say whether [the vendor's]
3 own equipment conforms to the specifications discussed in its handbook.” *Id.* Snyder’s opinion
4 therefore amounted to “speculation,” and the court excluded it. *Id.* Similarly, the Eastern District
5 of Pennsylvania has deemed Snyder’s testimony “entirely unreliable” on the question of whether a
6 given phone system could randomly or sequentially generate telephone numbers. *Dominguez v.*
7 *Yahoo!, Inc.*, 8 F. Supp. 3d 637, 643 (E.D. Pa. 2014), vacated and remanded sub nom. *Dominguez*
8 *v. Yahoo!, Inc.*, 629 F. App’x 369 (3d Cir. 2015). The Court should reach the same conclusion
9 here.

10 2. **Snyder’s Opinions Improperly Rely on Legal Conclusions and Dubi-**
11 **ous Reasoning.**

12 Even if Snyder’s analysis accurately identified the products SolarCity used, the nest of in-
13 consistencies and legal conclusions it is built upon would nevertheless render his opinion funda-
14 mentally unreliable. [REDACTED]

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]

20 It is the job of experts to “interpret and analyze factual evidence. They do not testify about
21 the law because the judge’s special legal knowledge is presumed to be sufficient.” *United States*
22 *v. Scholl*, 166 F.3d 964, 973 (9th Cir. 1999) (citation omitted); *Crow Tribe of Indians v. Racicot*,
23 87 F.3d 1039, 1045 (9th Cir. 1996) (“Expert testimony is not proper for issues of law.”). Courts
24 may therefore reject an expert witness’s opinions when the opinions are little more than legal con-
25 clusions. *See, e.g., Maffei v. N. Ins. Co. of New York*, 12 F.3d 892, 898-99 (9th Cir. 1993) (rejecting
26 an expert declaration as conclusory when it purported to answer what was ultimately a legal ques-
27 tion).

28 In this case, Snyder’s opinions are inextricably intertwined with his personal understanding

1 of the legal terms embedded in the definition of an ATDS. [REDACTED]

2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 Snyder's opinions regarding capacity are similarly suspect. As Snyder testified in his dep-
15 osition, it had "been explained" to him that he should use an expansive definition of capacity based
16 on recent FCC regulations. Snyder Dep. 241:24-242:10. That definition, however, is far from
17 uncontroversial and is currently being litigated in the Ninth Circuit and D.C. Circuit, among others.
18 *See Marks v. Crunch San Diego, LLC*, No. 14-56834 (9th Cir.); *ACA Int'l v. FCC*, No. 15-1211
19 (D.C. Cir.). [REDACTED]
20 [REDACTED]
21 [REDACTED]

22 Again, this is not the first time that Snyder has taken that approach. In *Legg*, for instance,
23 the court noted that Snyder intended to testify that the phone systems at issue met "the legal defi-
24 nition of an automatic telephone dialing system." 2014 WL 1767097, at *4. The court refused to
25 allow such testimony because implicit within it was "Snyder's conclusion as to the legal definition
26 of an automatic dialing system"—a conclusion that impermissibly encroached "on the responsibil-
27 ities of the judge and jury." *Id.* Similarly, in *Johnson v. Yahoo!, Inc.*, No. 14 CV 2028, 2014 WL
28 7005102, at *5 (N.D. Ill. Dec. 11, 2014), the district court refused to consider Snyder's ultimate

1 legal conclusion that a phone system's storage of numbers met the relevant definitions under the
2 TCPA. This Court should reach the same conclusion.⁶

3 **B. Snyder's Bias Provides an Independent Ground to Exclude His Report and**
4 **Testimony as Unreliable.**

5 Finally, Snyder's deposition testimony reveals that he has a significant personal bias that
6 not only undermines the credibility of his opinions, but also supports their inadmissibility under
7 Rule 702 and *Daubert*. The very nature of adversarial proceedings, of course, invites partiality
8 from paid experts on each side. More than a century ago, Judge Learned Hand described "the
9 natural bias of one called in such matters to represent a single side and liberally paid to defend it."
10 Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 Harv. L. Rev. 40,
11 53 (1901). Courts and commentators have continued to express those sentiments in an era when
12 parties often present dueling experts with entirely opposing views of an issue. See David E. Bern-
13 stein, *The Misbegotten Judicial Resistance to the Daubert Revolution*, 89 Notre Dame L. Rev. 27,
14 69 (2013).

15 In the usual case, at least at the trial stage, courts have recognized that such bias goes to
16 questions of expert credibility, not admissibility. It is the stuff of impeachment during cross-ex-
17 amination. See *United States v. Abonce-Barrera*, 257 F.3d 959, 965 (9th Cir. 2001) (stating, in the
18 criminal trial context, that "[g]enerally evidence of bias goes toward the credibility of a witness,
19 not his competency to testify, and credibility is an issue for the jury"); *Enyart v. Nat'l Conference*
20 *of Bar Examiners, Inc.*, 823 F. Supp. 2d 995, 1008 (N.D. Cal. 2011) ("As a general rule, bias is not
21 a permissible reason for the exclusion of expert testimony.").

22 Yet *Daubert* and its progeny make clear that district courts enjoy wide latitude "in deciding
23 how to determine" the reliability of expert testimony. *Ellis*, 657 F.3d at 982. What matters are the
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25 ⁶ Snyder adamantly argued in his deposition testimony that the descriptions of equipment he of-
26 fered "are functions that are within automatic-dialing systems. They are not descriptions that
27 constitute an ATDS under the law." Snyder Dep. 86:15-19. [REDACTED]
28 [REDACTED]

1 “particular circumstances of the particular case.” *Kumho Tire*, 526 U.S. at 150. Although courts
2 have not directly addressed the question, evidence of significant personal bias should be a factor in
3 a reliability analysis when there is evidence that an expert has a personal agenda that goes well
4 beyond merely trying to curry favor with the side that compensates it.

5 This is the case here. In 2014, Snyder helped initiate a TCPA lawsuit on behalf of his wife
6 and son, and his family received a direct financial benefit from that litigation through a settlement.
7 See Ex. E (Complaint, *Snyder v. IvisionMobile, Inc.*, No. 13-cv-05946 (N.D. Cal. filed Apr. 15,
8 2014). At the same time, Snyder was testifying as an expert for plaintiffs in separate litigation.
9 Compare Ex. F (Docket, *Snyder v. IvisionMobile, Inc.*) with Ex. G (Snyder Dep. in *Dominguez v.*
10 *Yahoo*). Further, Snyder has testified in this litigation and previous litigation that he enjoys working
11 as a plaintiffs’ side TCPA expert because he wants to end “annoying and harassing robocalls.”
12 Snyder Dep. 40:4-5; see also Ex. G (Snyder Dep. in *Dominguez v. Yahoo*) 52:15-20 (where Snyder
13 states that “[o]ne of the reasons I like doing this expert witness work is because I want these mes-
14 sages to stop. They’re annoying and harassing and they cost money. And not everyone looks like
15 you can pursue an action against it [sic]. They’re just harassing spam.”).

16 Snyder has worked hard to achieve that goal. In 78 of the 79 TCPA cases he has been
17 involved in, Snyder’s work has been on behalf of plaintiffs. All of his work income since 2014 has
18 come from serving as an expert witness—to a tune of \$300,000 last year alone.

19 Such evidence of significant personal bias, at least when taken in concert with the flaws in
20 Snyder’s analytical approach, supports the conclusion that his opinions should be excluded. Those
21 opinions are grounded in personal interest and speculation, rather than experience and knowledge.

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1 **V. CONCLUSION**

2 Accordingly, this court should exclude Snyder's opinions [REDACTED]

3 [REDACTED]

4 Dated: January 26, 2016

Respectfully submitted,

Orrick, Herrington & Sutcliffe LLP

6 By: /s/ Randall S. Luskey

7 Randall S. Luskey

8 Counsel for SOLARCITY CORP.

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